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In the Supreme Court of the United States

OCTOBER TERM 1967

No. 941

WILLIAM H. MANESS and
BETTY R. MANESS, his wife,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on October 13, 1966.

CITATIONS TO OPINIONS BELOW

The Order and Partial Summary Judgment of the United States District Court for the Middle District of Florida is reported at (M.D. Fla. 1965) 237 F. Supp. 918, 65-1 U.S.T.C. 9195. It is printed here as Appendix B. The Opinion of the

Court of Appeals is reported at (C.A. 5th 1966) .....F. 2d....., 66-2 U.S.T.C. 9195. It is printed here as Appendix C.

JURISDICTION

The Judgment of the Court of Appeals was entered on October 13, 1966 and is printed as Appendix D. The jurisdiction of this Court is invoked under 26 U.S.C., Section 7482 and 28 U.S.C., Sections 1254(1) and 2101(c).

QUESTIONS PRESENTED

I

Whether the Court of Appeals for the Fifth Circuit erred in determining that the expenses paid by William H. Maness, sometimes hereinafter referred to as the Petitioner, during the taxable year 1958, and deducted by the Petitioners on their Joint Federal Income Tax Return for that taxable year, were not ordinary and necessary expenses of carrying on a trade or business within the purview of Section 162 of the Internal Revenue Code of 1954? (26 U.S.C. 162)

II

In the alternative, whether the Court of Appeals erred in determining that the campaign expenses paid by the Petitioner during the taxable year 1958, were not expenses paid for the production of income within the intendment of Section 212 of the Internal Revenue Code of 1954? (26 U.S.C. 212)

III

In the alternative, whether the Court of Appeals erred in determining that the campaign expenses paid by the Petitioner during the taxable year 1958, were not expenses paid

for the management, conservation or maintenance of property held for the production of income pursuant to Section 212 of the Internal Revenue Code of 1954? (26 U.S.C. 212)

IV

In the alternative, in any event, whether the Court of Appeals erred in determining that the campaign expenses paid by the Petitioner during the taxable year 1958, were not capital in nature and not amortizable over the two-year term of office to which the Petitioner was elected?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following provisions of the United States Constitution and Statutory provisions, being lengthy, are set forth in Appendix A hereto as follows:

26 U.S.C. (Internal Revenue Code)
§ 162 and 212

STATEMENT OF THE CASE

The essential facts involved in the case may be summarized as follows:

This action arose under Section 1346(a)(1) of Title 28 of the United States Code, as amended. (26 U.S.C. 1346(a)(1)).

The Petitioners are citizens of the United States and reside at Jacksonville, Duval County, Florida. The Respondent is the United States of America. The Petitioners filed their Joint Federal Income Tax Return for the taxable year 1958 with the Office of District Director of Internal Revenue, Jacksonville, Florida.

On or about November 1, 1957, William H. Maness, sometimes hereinafter referred to as the Petitioner, was appointed by the then Governor of the State of Florida, the Honorable Leroy Collins, as a Circuit Judge in and for the Fourth Judicial Circuit of Florida to fill an additional judgeship, which had been created by the adoption of Revised Article V of the Constitution of the State of Florida in the month of November, 1956. The Notice of Appointment from the Office of the Secretary of State of the State of Florida received by the Petitioner was dated October 22, 1957.

Prior to the receipt of the Notice of Appointment, the Petitioner made no promises to the Governor of the State of Florida, to the Democratic party, or to any other person, with respect to any action in the exercise of such judgeship or with respect to running for reelection in any party primary or general election, or otherwise; and he did not at any time after that appointment incur any obligation whatsoever with respect to the exercise of the prerogatives of that office or to the Democratic party in order to gain or to hold the nomination of the Democratic party for that office.

After the receipt of the Notice of Appointment, the Petitioner resigned his office as State Representative, and the Governor issued his Commission, dated October 31, 1957. On the same day, the Petitioner filed his letter of acceptance, paid his State tax on his Commission, and, on November 1, 1957 was sworn in as a Circuit Judge.

Under the laws of the State of Florida, a Circuit Judge is prohibited from engaging in the private practice of law; and, consequently, on or about October 31, 1957 the Petitioner abandoned the private practice of law and severed his relationship with his law firm.

Prior to that date the Petitioner had turned over the matters then being handled by him or in which he had any interest to the other members of the law firm and, in addition, traveled with Louis F. Kurz, Jr., Esquire, now deceased, to New York City, New York, where he introduced Mr. Kurz to many of his admiralty clients. The Petitioner also resigned as Associate Editor of American Maritime Cases, a position which he had held since the death of Ruben Ragland, Esquire, in the year 1954 and was instrumental in obtaining Louis F. Kurz, Jr., Esquire to succeed him in that capacity. At the same time, the Petitioner entered into an agreement with the remaining members of his law firm, pursuant to which fees earned for services previously performed by him would be paid to him, after allowances for reasonable expenses, and sold his interest in the assets of the law firm to the remaining law partners. Accordingly, the Petitioner completely relinquished his law practice in order to devote his full time to being a judge.

Under the Constitution and Laws of the State of Florida, the power of appointment of the Governor of the State was limited to the period from the date of the appointment of the Petitioner until the first Tuesday after the first Monday in January following the next ensuing general election. Since the next ensuing general election was to be held in the fall of the year 1958, it was mandatory that the Petitioner qualify as a candidate to succeed himself in the Democratic primary and in the general election, held in that year, in order for him to retain, maintain and conserve the office of Circuit Judge to which he had been appointed; otherwise, that office would be vacant, o filled by others, after the first Tuesday after the first Monday in the year 1959 (following the general election in the year 1958).

Moreover, under the Constitution and Laws of the State

of Florida, it was necessary for the Petitioner to qualify and to run for election at the next general election held under the Laws of the State of Florida, if he was to be a Circuit Judge for the ensuing term. In addition, under the laws of the State of Florida, it was necessary for the Petitioner to qualify and to run in the Democratic primary, which is held pursuant to the Laws of the State of Florida, if he was to run as a Democratic nominee for the office of Circuit Judge in that general election.

The primaries, under the laws of the State of Florida, were held on September 9, 1958 and September 30, 1958. The qualifying period for candidates for Circuit Judge in and for the Fourth Judicial Circuit of Florida began at 12:00 noon, on June 24, 1958, and ran until 12:00 noon, on July 8, 1958. On or about June 24, 1958, the Petitioner paid to the Secretary of State of the State of Florida the qualifying fees required by law to qualify as a candidate in a party primary, the sum of $810.00, which would have been the maximum expense required of the Petitioner to succeed himself as a Circuit Judge, if no one had qualified to run against him.

On July 8, 1958, however, at 11:11 A.M., within the hour before the deadline for qualifying passed at 12:00 noon, Will O. Murrell, Sr., Esquire, qualified with the Secretary of State in Tallahassee, Florida, to oppose the Petitioner in the Democratic primary. No person qualified to run for the office of Circuit Judge in the Republican primary, so that the nominee of the Democratic party in the primary election between Mr. Murrell and the Petitioner would be elected to serve the remaining two years before the Constitution of the State of Florida required that all Circuit Judges face reelection.

In the ensuing campaign prior to the first primary, on September 9, 1958, the opponent of the Petitioner expended

the total sum of $3,777.77, including his $810.00 qualifying fee, and waged a vigorous campaign for the office of Circuit Judge.

During the same period of time, in order for the Petitioner to retain his judgeship and to counter the effects of the campaign of Mr. Murrell, it was necessary for him to spend the total amount of $1,590.00, not including his qualifying fee in the amount of $810.00.

Notwithstanding the fact that under the laws of the State of Florida, candidates for a judgeship may accept campaign contributions to defray the expenses of their campaigns, the Petitioner declined many offers of contributions by lawyers and others because of his conviction that insofar as possible, a candidate for judicial office should avoid acceptance of contributions which could be misunderstood by the public generally, and thus tend to destroy confidence in our courts.

The expenditures made by the Petitioner in the amount of $1,590.00, in furtherance of his campaign to hold the office of Circuit Judge were incurred and expended only for such items as are specially authorized by law, such as newspaper advertising, television time, cards, handbills and other similar items.

All of the campaign expenses paid by the Petitioner were made in accordance with the laws of the State of Florida with reference to Campaign Deposit Slips, Campaign Treasurer's Preelection Reports to the Secretary of State and Orders Authorizing Campaign Expenditures, and Certificates of Claimants and Orders for Payments.

The Petitioner obtained 40,081 votes to 11,842 votes for Mr. Murrell, was declared by the Secretary of State to be

elected, and was commissioned and held the office of Circuit Judge in and for the Fourth Judicial Circuit of Florida, not only to the first Tuesday after the first Monday in January, 1961, but, subsequently, was reelected without opposition in the general election held in the year 1960, to serve a period of six years until the first Tuesday after the first Monday in January in the year 1967. On April 1, 1963, however, the Petitioner resigned and surrendered his judgeship because of mounting financial pressures and the limitations of the salary and returned to the private practice of law.

The Petitioners timely filed their Joint Federal Income Tax Return for the taxable year 1958 with the Office of District Director of Internal Revenue, Jacksonville, Florida, and duly paid to the said Office the income taxes shown on the said Joint Federal Income Tax Return to be due and owing by them for that taxable year in the amount of $10,654.27.

The Petitioner deducted the campaign expenses paid during the taxable year 1958 in the aggregate amount of $1,590.00 on the Joint Federal Income Tax Return of the Petitioners for that taxable year.

In a Statutory Notice of Deficiency, dated September 13, 1961, the Commissioner of Internal Revenue determined that the campaign expenses, in the aggregate amount of $1,590.00, claimed by the Petitioners on their Joint Federal Income Tax Return for the taxable year 1958 should be disallowed and asserted that additional income taxes were due from the Petitioners for that taxable year.

In consequence of the determinations and assertions of the Commissioner of Internal Revenue in his Statutory Notice of Deficiency, the Petitioners paid to the Office of District Director of Internal Revenue, on or about January 22, 1962,

the additional income taxes, plus statutory interest thereon, for the taxable year 1958 as asserted by the Commissioner of Internal Revenue.

On or about June 6, 1962, and within the time specified by law, the Petitioners filed with the Office of District Director of Internal Revenue, a Claim for Refund seeking a refund of the additional income taxes and statutory interest paid on or about January 22, 1962, which had been assessed and collected from them by virtue of the disallowance of the deduction claimed for campaign expenses in the amount of $1,590.00.

The said Claim for Refund was disallowed by the Office of District Director of Internal Revenue, and the Petitioners were notified of its disallowance by a Statutory Notice of Disallowance, dated November 29, 1962.

The instant action then was instituted timely on or about April 14, 1964.

Subsequently, the Respondent moved for Summary Judgment in its favor on the grounds that there were no material facts in dispute and that it was entitled to a judgment in its favor as a matter of law. The Petitioners objected to the Motion for Summary Judgment of the Respondent; a hearing was held on November 18, 1964, in the District Court; and in an Order and Partial Summary Judgment, filed January 8, 1965, the District Court ordered and adjudged that the Motion for Summary Judgment of the Respondent was granted insofar as it related to the deduction for campaign expenses in the amount of $1,590.00 by the Petitioners.

An appeal was taken from that Order and Partial Summary Judgment. The Petitioners contended that the campaign ex-

penses paid by the Petitioner, William H. Maness, during the taxable year 1958 and deducted by the Petitioners on their Joint Federal Income Tax Return for the taxable year were ordinary and necessary expenses of carrying on a trade or business within the purview of Section 162 of the Internal Revenue Code of 1954 (26 U.S.C. 162); that, in the alternative, the campaign expenses paid by the Petitioner during the taxable year 1958 were expenses paid for the production of income within the intendment of Section 212 of the Internal Revenue Code of 1954 (26 U.S.C. 212); that, in the alternative, the campaign expenses paid by the Petitioner during the taxable year 1958 were expenses paid for the management, conservation, or maintenance of property held for the production of income pursuant to Section 212 of the Internal Revenue Code of 1954 (26 U.S.C. 212); that, in the alternative, in any event, the amounts paid by the Petitioner during the taxable year 1958 were capital in nature and were amortizable over the two-year term of office to which the Petitioner was elected; and that the District Court erred in granting the Motion for Summary Judgment of the Respondent and in entering a Partial Summary Judgment for the Respondent.

In its opinion, entered on October 13, 1966, the Court of Appeals for the Fifth Circuit declined to adopt the contentions of the Petitioners and held that each of those contentions were not well taken.

ARGUMENT AND REASONS FOR GRANTING THE WRIT

This cases raises substantial and important questions of law under the Internal Revenue Code. The instant case affects the Federal income taxes of every officeholder who must incur expenses in a campaign for election or reelection; and, as such, it is important to every elected official in the United States. Moreover, the opinion and judgment of the Court of Appeals for the Fifth Circuit on the matters in question are in error. The campaign expenses paid by the Petitioner, William H. Maness, during the taxable year 1958 and deducted by the Petitioners on their Joint Federal Income Tax Return for that taxable year are ordinary and necessary expenses of carrying on a trade or business within the purview of Section 162 of the Internal Revenue Code of 1954. Section 162 of the Internal Revenue Code of 1954 (26 U.S.C. 162), reads, in pertinent part, as follows:

> "(a) In General.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including***"

The Petitioners urge that, under all of the facts and circumstances in this case, the campaign expenses paid by the Petitioner are deductible for Federal income tax purposes. Whether or not expenditures are ordinary and necessary business expenses of a trade or business is a question of fact to be determined from all of the evidence and circumstances in each case. *Commissioner v. Heininger* (1944) 320 U.S. 46. The expenditures here involved were reasonable in amount, in fact, very modest. There is no question as to the accuracy of the amount of the deduction claimed. The only question is whether or not the campaign expenses are properly deductible for Federal income tax purposes.

The performance of a judicial office constitutes a "trade or business" within the purview of Section 162 of the Internal Revenue Code of 1954, according to tax law terminology. Section 7701(a) of the Internal Revenue Code of 1954 (26 U.S.C. 7701). The word "business" is a comprehensive term, and can be defined as "that which occupies the time, attention and labor of men for the purpose of a livelihood or profit". This definition was given judicial sanction by the Supreme Court in *Flint v. Stone Tracy Co.* (1911) 220 U.S. 107. The Petitioner was entitled, therefore, to deduct from his income, all of the "ordinary and necessary" expenses paid during the taxable year 1958 in carrying on that "trade or business". He should be able, that is, to deduct all expenses that related to the discharge of his functions as a Circuit Judge. One of those functions was campaigning for reelection. Particularly is this so when the Petitioner had divested himself completely of his law practice in order to devote his entire time to being a Circuit Judge. He had no other trade or business, indeed, no other means of livelihood or support.

It cannot be said that the expenses were not "ordinary". Certain facts should be emphasized. The Petitioner was appointed, on or about November 1, 1957, by the then Governor of the State of Florida to the office of Circuit Judge in and for the Fourth Judicial Circuit of Florida to fill an additional judgeship which had been created by the adoption of revised Article V of the Constitution of the State of Florida in the month of November, 1956. After the receipt of his Notice of Appointment, the Petitioner resigned his office as State Representative. Under the laws of the State of Florida, a Circuit Judge is prohibited from engaging in the private practice of law; and, consequently, on or about October 31, 1957, the Petitioner abandoned the private practice of law and severed his relationship with his law firm.

Prior to that date the Petitioner had turned over the matters then being handled by him or in which he had any interest, to the other members of the law firm and, in addition, traveled with Louis F. Kurz, Jr., Esquire, now deceased, to New York City, New York, where he introduced Mr. Kurz to many of his admiralty clients. The Petitioner also resigned as Associate Editor of American Maritime Cases, a position which he had held since the death of Ruben Ragland, Esquire, in the year 1954, and was instrumental in obtaining Louis F. Kurz, Jr., Esquire, to succeed him in that capacity. At the same time, the Petitioner entered into an agreement with the remaining members of his law firm, pursuant to which fees earned for services previously performed by him would be paid to him after allowances for reasonable expenses, and sold his interest in the assets of the law firm to the remaining law partners. Accordingly, the Petitioner completely relinquished his law practice in order to devote his full time to being a Circuit Judge.

Moreover, it should be pointed out that prior to the receipt of his Notice of Appointment, the Petitioner made no promises to the Governor of the State of Florida, to the Democratic party, or to any other person, with respect to any action in the exercise of such judgeship or with respect to running for reelection in any party primary or general election, or otherwise and he did not at any time after that appointment incur any obligation whatsoever with respect to the exercise of the prerogatives of that office or to the Democratic party in order to gain or to hold the nomination of the Democratic party for that office.

Consequently, at the time the Petitioner ran for reelection in the year 1958, he was already a Circuit Judge; he had completely relinquished his law practice; he had no commit-

ment to the Democratic party or anyone to run again; but he had to run to continue his trade or business of being a Circuit Judge and only means of livelihood or support. The campaign expenses were "ordinary".

The campaign expenses incurred by the Petitioner were "necessary" and modest. Under the Constitution and Laws of the State of Florida, the power of appointment of the Governor of the State was limited to the period from the date of the appointment of the Petitioner until the first Tuesday after the first Monday in January following the next ensuing general election. Since the next ensuing general election was to be held in the fall of the year 1958, it was mandatory that the Petitioner qualify as a candidate to succeed himself in the Democratic primary and in the general election, held in that year.

Further, under the Constitution and Laws of the State of Florida, it was necessary for the Petitioner to qualify and to run for election at the next general election held under the Laws of the State of Florida, if he was to be a Circuit Judge for the ensuing term. In addition, under the laws of the State of Florida, it was necessary for the Petitioner to qualify and to run in the Democratic primary, which is held pursuant to the Laws of the State of Florida, if he was to run as the Democratic nominee for the office of Circuit Judge in that general election.

The primaries, under the laws of the State of Florida, were held on September 9, 1958 and September 30, 1958. The qualifying period for candidates for Circuit Judge began at 12:00 noon, on June 24, 1958, and ran until 12:00 noon on July 8, 1958. On or about June 24, 1958, the Petitioner paid to the Secretary of State of the State of Florida the qualifying fees required by law to qualify as a candidate in a party

primary, the sum of $810.00, which would have been the maximum expense required of the Petitioner to succeed himself as a Circuit Judge, if no one had qualified to run against him.

On July 8, 1958, however, at 11:11 A. M., within the hour before the deadline for qualifying passed at 12:00 noon, Will O. Murrell, Sr., Esquire, qualified with the Secretary of State in Tallahassee, Florida, to oppose the Petitioner in the Democratic primary. No person qualified to run for the office of Circuit Judge in the Republican primary, so that the nominee of the Democratic party in the primary election between Mr. Murrell and the Petitioner would be elected to serve the remaining two years before the Constitution of the State of Florida required that all Circuit Judges face reelection.

In the ensuing campaign prior to the first primary, on September 9, 1958, the opponent of the Petitioner expended the total sum of $3,777.77, including his $810.00 qualifying fee, and waged a vigorous campaign for the office of Circuit Judge. During the same period of time, in order for the Petitioner to retain his judgeship and to counter the effects of the campaign of Mr. Murrell, it was necessary for him to spend the total amount of $1,590.00, not including his qualifying fee in the amount of $810.00.

It is clear, therefore, that the campaign expenses of the Petitioner were "necessary" if he were to continue in his trade or business of being a Circuit Judge.

This is not a case dealing with campaign contributions made by one person to further the candidacy of another. Notwithstanding the fact that under the laws of the State of Florida, candidates for a judgeship may accept campaign contributions to defray the expenses of their campaigns, the

Petitioner declined many offers of contributions by lawyers and others because of his conviction that insofar as possible a candidate for judicial office should avoid acceptance of contributions which could be misunderstood by the public generally, and thus tend to destroy confidence in our courts.

And, the expenditures made by the Petitioner, in the amount of $1,590.00, in furtherance of his campaign to hold the office of Circuit Judge were incurred and expended only for such items as are specifically authorized by law, such as newspaper advertising, television time, cards, handbills and other similar items. All of the campaign expenses paid by the Petitioner were made in accordance with the laws of the State of Florida. with reference to Campaign Deposit Slips, Campaign Treasurer's Preelection Reports to the Secretary of State and Orders Authorizing Campaign Expenditures, and Certificates of Claimants and Orders for Payments.

Thus, in the instant case, there were no contributions made to the Petitioner with which to defray campaign expenses; the campaign expenses were paid solely by the Petitioner; those expenses were reasonable in every respect, especially in the light of the amounts expended by the opponent of the Petitioner; and they were by all means legitimate.

The Petitioners are not unmindful of the cases of *David A. Reed* (1928) 13 B.T.A. 513; *Michael F. McDonald* (1943) 1 T.C. 738, aff'd. (C.A. 3d 1943) 139 F. (2d) 400, aff'd. (1944) 323 U. S. 57; *Mays v. Bowers* (D.C.E.D.S.C. 1952) 106 F. Supp. 337, aff'd. (C.A. 4th 1953) 201 F. 2d 401; and *Shoyer, et al. v. United States* (C.A. 3d 1961) 290 F.2d 817. It is submitted, however, that those cases are distinguishable on their facts. Each of the cases is discussed in detail and distinguished later in this Argument.

It follows that, under the circumstances existing in the instant case, the campaign expenses involved were ordinary and necessary business expenses.

Moreover, the campaign expenses paid by the Petitioner during the taxable year 1958, were expenses paid for the production of income or for the management, conservation or maintenance of property held for the production of income within the intendment of Section 212 of the Internal Revenue Code of 1954. The campaign expenses here involved were incurred for the production of income. In addition, the campaign expenses were incurred for the management, conservation or maintenance of property, i. e., a public office held for the production of income. The literal language of Section 212 of the Internal Revenue Code of 1954 (26 U.S.C. 212) is broad enough to allow a deduction for expenses so incurred. In that section, Congress has stated, in pertinent part, as follows:

> "In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year—(1) for the production or collection of income; (2) for the management, conservation, or maintenance of property held for the production of income; or *****"

Prior to the enactment of this Section of the Internal Revenue Code, taxpayers in computing income were not allowed deductions for expenses incurred, unless they were "ordinary and necessary expenses, paid or incurred *** in carrying on a trade or business." Congress, by this Section, introduced a new type of deduction, for it allowed a deduction for the ordinary and necessary expenses of an individual paid or incurred for the production of income or for the manage-

ment, conservation or maintenance of property held for the production of income. Before this Section was introduced into the Internal Revenue Code in the year 1942, an expense to be deductible had to be "ordinary and necessary" in its relation to the business of the taxpayer. Under this Section it need only be "ordinary and necessary" in its relationship to the efforts of the taxpayer to produce income or to manage, conserve or maintain property held for the production of income. Hence, while the words "ordinary and necessary" expenses, defining permissible deductions, remained the same as in Section 162, *supra,* they have been given added content in their new relationship.

The Revenue Act of 1942 articulated the purpose of Congress to wipe out every vestige of a policy which denied tax deductions for legitimate expenses incurred in producing taxable income. Taxation on net, not on gross, income has always been the broad basic policy of our income tax laws. Net income may be defined as what remains out of gross income after subtracting the ordinary and necessary expenses incurred in efforts to obtain or to keep it. In the year 1941, the Supreme Court upheld in *Higgins v. Commissioner* (1941) 312 U.S. 212, a finding of the then Board of Tax Appeals that one who managed, conserved and maintained his own property was not engaged in a "trade or business" and for that reason was not entitled to deduct expenses incurred in producing his gross income. The effect of this holding was to impair the general policy of Congress to tax only net income.

Congress in the Revenue Act of 1942 took note of this impairment and indicated its allegiance to the net income tax policy. Except for transactions carried on "primarily as a sport, hobby, or recreation," Congress provided a deduction for all ordinary and necessary expenses incurred in the production of income. The language it utilized was certainly far

broader than was required to meet the narrow problem presented by the *Higgins v. Commissioner* case, *supra.* Congress specifically disposed of the problem by allowing a deduction for the expenses incurred in "* * * the management, conservation, or maintenance of property held for the production of income". Had Congress simply enacted these words, and nothing more, it might properly have been inferred that it intended to grant the type of deduction denied in the *Higgins v. Commissioner* case, *supra,* and no other. But, it provided an additional deduction, in the very same action, for expenses incurred in "the production * * * of income".

The expenses here involved were incurred in an effort to produce income. And, surely, they were expended in order to conserve or maintain property held for the production of income. To hold that Congress in the new Section, which was introduced into the Internal Revenue Code in the year 1942, concerned itself only with the restrictive issue created by the *Higgins v. Commissioner* case, *supra,* would be to deny any meaning or validity to the clause "the production of income"; in a larger sense, such a construction would carve out of the Section a vital segment which Congress intentionally put there. Under these circumstances, the amounts paid during the taxable year here in question were expended for the production of income within the intendment of Section 212 of the Internal Revenue Code of 1954. Moreover, it would seem to be clear that the expenses were paid for the management, conservation or maintenance of property held for the production of income pursuant to Section 212 of the Internal Revenue Code of 1954.

None of the decided cases are on point or decisive. In the *David A. Reed* case, *supra,* the taxpayer therein was a candidate for the office of United States Senator from the State

of Pennsylvania and had the support and assistance of the Republican State Committee of Pennsylvania and the Republican Committee of Allegheny County. These Committees were engaged in promoting the success of the Republican state ticket and the Republican ticket for Allegheny County, respectively, including the candidacy of the taxpayer. During the year 1922, the taxpayer paid into the fund of the Republican State Committee the sum of $5,000.00 and into the fund of the Allegheny County Committee the sum of $250.00, which amounts were reported by him to the State authorities and to the United States Senate as campaign expenses. In his Federal Income Tax Return for the year 1922, the taxpayer deducted the amounts from his gross income as business expenses. In denying the deduction as claimed by the taxpayer for campaign expenses, the Tax Court alluded to the possibility that running for office did not constitute a business; stated that the expenditures there involved were not expenses which should be classified as business expenses but were merely voluntary contributions; and found that any benefits flowing or expected to be derived therefrom were indirect and remote. The Tax Court relied heavily upon the facts that the amounts involved were paid into the funds of the State and County Committees and were not expended by the taxpayer solely in furtherance of his own candidacy, and held that the amounts gratuitously paid by him to promote the success of other candidates could not constitute ordinary and necessary expenses in carrying on a trade or business, and, thus, were not deductible from gross income as business expenses.

In the *David A. Reed* case, *supra*, the taxpayer was not in office at the time he campaigned for it; whereas, the Petitioner here was actually the incumbent. In addition, the *David A. Reed* case, *supra*, involved voluntary contributions,

which were not expended by the taxpayer therein solely in furtherance of his own candidacy; whereas, in the instant case, the campaign expenses were paid solely by the Petitioner; those expenses were reasonable in every respect; and they were by all means legitimate.

In the *Michael F. McDonald* case, *supra*, the taxpayer therein was a lawyer, admitted to the Bar of the State of Pennsylvania. In December, 1938, he was appointed by the Governor of that State to serve an unexpired term as Judge of the Court of Common Pleas of Luzerne County. Under Pennsylvania law, such an interim judgeship was filled for a full term at the next election. The taxpayer there accepted this temporary appointment with the understanding and agreement that in the year 1939, he would be a candidate to succeed himself in both the primary and general elections for a full term. To obtain the support of his party organization he was required to contribute to the party fund an "assessment" made by the executive committee of the party against all of the candidates of the party. The amounts of the "assessments" were fixed on the basis of the total prospective salaries to be received from the various offices. The proceeds from the "assessments" went to the general campaign fund. The expenditures from the fund were principally on behalf of the entire ticket of the party. In addition to the contributions to the fund made by the taxpayer in the amount of $8,000.00, he expended on his own behalf the amount of $5,017.27 for customary campaign expenses -- advertising, printing, traveling, etc., or a total in the amount of $13,017.27. He received a contribution in the amount of $500.00 from his son for the purpose of defraying part of his campaign expenditures. The taxpayer was defeated in the general election. In his income tax return for the year 1939, he deducted the amount of $13,017.27 as "reelection expense".

Despite the contentions of the taxpayer that he was entitled to deduct his campaign expenses under Section 23(a)(1)(A) of the Internal Revenue Code of 1939 as ordinary and necessary expenses of carrying on a trade or business, or under Section 23(a)(2), *supra*, as a nontrade or nonbusiness expense paid or incurred for the production or collection of income, the Court determined his campaign expenses were not incurred in the business of being a judge, but in trying to be a judge for the next ten years, and that there was no clear provision of the Internal Revenue Code permitting their allowance as a deduction.

Some of the distinctions between the instant case and the *Michael F. McDonald* case, *supra*, are patent. In the *Michael F. McDonald* case, *supra*, the taxpayer accepted a temporary appointment with the understanding and agreement that he would be a candidate to succeed himself in both the primary and general elections for a full term; he was unsuccessful in his campaign; he received campaign contributions to defray a part of his campaign expenditures; and a part of the amounts involved were not expended by the taxpayer therein solely in furtherance of his own candidacy. On the other hand, in the instant case, the Petitioner, prior to being appointed to the office of Circuit Judge, made no commitments to anyone with respect to his future conduct or course of action; he completely divorced himself from his prior trade or business, practicing law, in order to be a Circuit Judge; he was successful in his campaign for reelection; he accepted no campaign contributions from anyone; the amounts expended in an effort to remain a Circuit Judge were solely from his own funds; and all of the amounts expended were solely in furtherance of his own candidacy. The simple facts are, the Petitioner was a Circuit Judge, he had given up his law practice, he had no other business or means of support and livelihood, and he

had no other alternative but to promote, retain and maintain his business of being a Circuit Judge.

In the *Mays v. Bowers* case, *supra*, the taxpayer therein, in May, 1946, was elected to the City Council of Columbia, South Carolina, a position carrying a salary of $4,000.00 per year. The taxpayer there did not deduct his campaign expenses on the original Federal Income Tax Returns filed by him. Subsequently, while there was no record of the expenses of the taxpayer in his campaign, Claims for Refund were filed on the proposition that his estimated campaign expenses applicable to the taxable income for a position as City Councilman for such period, to-wit: the sum of $209.03 for the calendar year 1946 and the sum of $336.41 for the calendar year 1947 should be allowed as a deduction for those taxable years. His total campaign expenses were estimated to be the amount of $4,449.00, but by reason of the sudden and unexpected death of the taxpayer, at the time of trial that estimate could not be sustained and a reduced estimate in the amount of $2,355.31 was submitted. The taxpayer there did not contend that his estimated expenses should be deducted in the year they were paid as ordinary and necessary business expenses but contended only that they should be amortized over the term of office to which the taxpayer was elected and a ratable portion deducted from the salary of the office for each year of the term. Both the District Court and the United States Court of Appeals for the Fourth Circuit determined that the deductions claimed should be disallowed.

Little more need be said to show the distinctions between that case and the instant case. There was no showing that the taxpayer was in office when he ran; there was no showing that the campaign expenditures were solely those of the taxpayer; there was no showing that the campaign expenses

were not reimbursed by campaign contributions; the campaign expenses were not deducted on his original Federal Income Tax Returns but merely estimated in later Claims for Refund; and, due to the untimely death of the taxpayer that estimate of campaign expenses could not be sustained at the time of trial and a reduced estimate was submitted. Finally, the taxpayer therein did not contend that his campaign expenses, as estimated, should be deducted when paid as ordinary and necessary business expenses or expenses incurred to produce income.

The case of *Shoyer, et al. v. United States, supra,* involved a per curiam affirmance by the Court of Appeals for the Third Circuit of an unreported District Court judgment, and, therefore, the facts of record are not available. It should be pointed out, however, that the decision was rendered by the same Court of Appeals which had previously decided the *Michael F. McDonald,* case, *supra.*

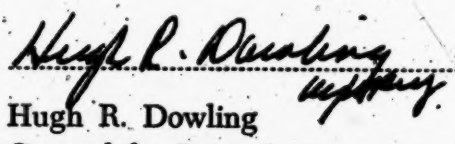
In view of all of the foregoing, it is clear that if the campaign expenses were not ordinary and necessary business expenses, they were incurred in an effort to produce income or were expended in order to conserve or maintain property held to produce income.

Finally, in any event the campaign expenses paid by the Petitioner during the taxable year 1958 were capital in nature and therefore amortizable over the two-year term of office to which he was elected. It does not appear that the lower court gave adequate consideration to this contention of the Petitioner. The expenses here involved were clearly not personal expenses. They were not gifts. Hence they would have to be at least capital in nature; and, if so, the Petitioners assert in the alternative that the capital expenditures should be amortized over the life of the office.

CONCLUSION

From the foregoing argument and reasons, it is patent that the instant case raises substantial and important questions of law under the Internal Revenue Code and affects a large number of the officeholders, both Federal, State and local, in the country. In addition, the opinion and decision of the Court of Appeals for the Fifth Circuit on this important matter is incorrect. It follows that this Petition for a Writ of Certiorari should be granted and the judgments of the lower courts vacated.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petition For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was served this 6th day of January, 1967, upon the following persons by depositing four copies of same addressed to each in the United States mail with sufficient postage prepaid;

Honorable Thurgood Marshall
Solicitor General
United States Department of Justice
Washington, D. C. 20530

Honorable Mitchell Rogovin
Assistant Attorney General
Tax Division
United States Department of Justice
Washington, D. C. 20530

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In the
Supreme Court of the United States
OCTOBER TERM 1967

No. _____

WILLIAM H. MANESS and
BETTY R. MANESS, his wife,

Petitioners

v.

UNITED STATES OF AMERICA,

Respondent

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Statutory Provisions Involved:

1. 26 U.S.C. (Internal Revenue Code), Section 162:

"SEC. 162 TRADE OR BUSINESS EXPENSES

(a) In General. – There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including –

(1) a reasonable allowance for salaries or other compensation for personal services actually rendered;

(2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business; and

(3) rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the tatxpayer has not taken or is not taking title or in which he has no equity.

For purposes of the preceding sentence, the place of residence of a Member of Congress (including any Delegate and Resident Commissioner) within the State, congressional district, Territory, or possession which he represents in Congress shall be considered his home, but amounts expended by such Members within each taxable year for living expenses shall not be deductible for income tax purposes in excess of $3,000."

* * * *

2. 26 U.S.C. (Internal Revenue Code), Section 212:

"SEC. 212. EXPENSES FOR PRODUCTION OF INCOME

In the case of an individual, there shall be allowed as a

deduction all the ordinary and necessary expenses paid or incurred during the taxable year--

(1) for the production or collection of income;

(2) for the management, conservation, or maintenance of property held for the production of income; or

(3) in connection with the determination, collection, or refund of any tax."

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

WILLIAM H. MANESS and
BETTY R. MANESS, his wife

Plaintiffs,

No. 64-97-Civ-J

v.

UNITED STATES OF AMERICA,

Defendant.

ORDER AND
PARTIAL SUMMARY JUDGMENT

This case is before the Court on motions of both plaintiffs and defendant for summary judgment. There is no dispute as to the facts, these having been stipulated by the parties. The sole issue presented is the interpretation of provisions of the Internal Revenue Code in their application to certain expenses incurred by plaintiff, William H. Maness, in his 1958 campaign for re-election to the office of Circuit Judge in and for the Fourth Judicial Circuit of Florida. Plaintiff, Betty R. Maness, is a party to this suit for refund of taxes simply by virtue of the joint return which was filed by her husband and her:

In November, 1957, Maness was appointed to the office of Circuit Judge by the Governor and, as required by law, discontinued all private practice of law. Under the laws of the State of Florida, it was necessary for Maness to qualify as a candidate to succeed himself in the Democratic Primary and

in the General Election held in 1958, in order to continue in the office of Circuit Judge. The laws of Florida required Maness to pay $810.00 to the Secretary of State of Florida as qualifying fees and committee assessments in order to qualify as a candidate in the party primary. In addition, Maness spent $1590.00 in his campaign for re-election. Maness refused to accept campaign contributions and paid all of these sums from his own personal funds. The government conceded that these expenditures were normal and reasonable in amount.

In their joint tax return for 1958, plaintiffs sought to deduct these amounts as business expenses, but such deductions were disallowed by the Commissioner. Plaintiffs paid an additional assessment of $1200.00, plus statutory interest in the amount of $197.52, and filed a timely claim for refund. This claim was denied, and the present suit was filed seeking recovery of these additional taxes, together with interest.

In the view of this Court, two questions require consideration:

1. Are reasonable campaign expenses of a candidate for public office deductible as ordinary and necessary expenses for the production of income under Section 212 of the Internal Revenue Code?

2. Are qualifying fees and assessments paid pursuant to State law deductible as "taxes" within the meaning of Section 164 of the Internal Revenue Code?

Before his appointment as Circuit Judge, Maness had been a successful lawyer for a number of years. Upon his appointment to the bench, he was required by law to give up this profitable pursuit and in large part depended upon the salary of that office for his livelihood. In order to continue in the

office and to continue receiving the income from that office, it was necessary in 1958 to place his campaign before the electorate in both the party primary and the general election.

When persons run for public office, it is often necessary, as it was with Judge Maness, that they suffer the expense of fees and assessments even if they do not have opposition. If they are faced with opposition, they must, in addition, spend money to advertise their campaigns. If these persons were engaged in private ventures, there is no question that such ordinary and necessary expenses would be deductible. For example, it has been held that monies spent by a group in seeking proxies in an "election" for control of a corporation are deductible under Section 212. *Surasky v. U.S.*, 325 F. 2d 191 (5 Cir. 1963). Indeed, a dairy corporation has even been allowed to deduct the cost of sending its president on an African Safari as an advertising expense under Section 162. *Sanitary Farms Dairy Inc. v. C.I.R.*, 25 T.C. 463 (1955). Yet public officials are apparently treated differently. Quite contrary to the principles of taxing *net income*, public officials are taxed on the income they derive from their offices and at the same time are denied the deductions for the legitimate, ordinary and necessary expenses which they are forced to incur in order to obtain their offices and the consequent income. This is not a congressional determination. As Mr. Justice Black pointed out in his dissent in *McDonald v. C.I.R.*, 323 U.S. 57, the language of Section 212, 26 U.S.C., is sufficiently broad to allow a deduction for the expenses so incurred. This section provides:

> "In the case of an individual, there shall be allowed all the ordinary and necessary expenses paid or incurred during the taxable year-
>
> (1) for the production or collection of income;

(2) for the management, conservation, or maintenance of property held for the production of income; * * *"

It is difficult to understatnd how this language provides any rational basis for the distinction between funds expended in seeking income from public services and funds expended in seeking income from private services. In 1944, however, just two years after the enactment of Section 212, the Supreme Court, in a five to four decision, decided in *McDonald* that campaign expenses of a candidate for a salaried public office were not deductible under this section, in ascertaining income subject to Federal income tax. It is the opinion of this Court that this decision, with its persuasive dissenting opinion by Mr. Justice Black, should be reconsidered. This is a matter, however, which more properly lies within the jurisdiction of the appellate courts. Since the present case is indistinguishable from *McDonald,* insofar as it relates to the deduction of the $1590.00 expended by Maness to advertise his candidacy, this Court feels reluctantly bound by that decision.

This Court is of the opinion, however, that the present case is distinguishable from the facts of *McDonald* insofar as the deduction for the $810.00 in qualifying fees is concerned. See *Davenport v. Campbell,* ..... F. Supp. ....., (N.D. Texas 1964). *McDonald* did not consider the applicability of Section 164, and raised different considerations. In *McDonald,* the assessments were made by, paid to, and expended by the Executive Committee of petitioner's political party. In the present case the fees were paid to the Secretary of State of the State of Florida pursuant to the requirements of state law. Sec. 99.031, F.S. (1957).

Although it is true that Sec. 99.103, F.S. (1957) authorized the Secretary of State to pay these fees over to the execu-

tive committee of the candidate's party if certain conditions were met, this does not change the nature of these mandatory, involuntary extractions as far as the application of Section 164, I.R.C. is concerned. In the first instance, this is not an automatic payover. The Florida Act establishes certain criteria which the political party must meet in order to qualify for such payments. It is entirely possible that the fees paid by any particular candidate would remain entirely with the State. Secondly, if the fees are a mandatory, involuntarily extraction, made pursuant to state law and paid to a state official, it is immaterial how the state chooses to expend the funds. If the state decides that they are to be used to subsidize the political parties, this has no more effect on their deductibility by the taxpayer under Section 164 than a decision by the state to subsidize political parties out of general revenues would affect, for instance, the deductibility of a state sales tax payment under Section 164. These mandatory, involuntary extractions fit the language of Section 164(a) and are not excluded by any of the provisions of Section 164(b).

Upon consideration, it is therefore

ORDERED AND ADJUDGED:

1. Defendant's Motion for Summary Judgment is granted insofar as it relates to the deduction of $1590.00 in campaign expenses and is denied in all other respects.

2. Plaintiffs' Motion for Summary Judgment is granted insofar as it relates to the deduction of $810.00 in fees and assessments paid, and is denied in all other respects.

3. Defendant, United States, shall pay to the Plaintiffs a refund of taxes in the amount of $405.00 and a refund of assessed interest paid in the amount of $66.66, together with

statutory interest on this total amount from the date of payment by Plaintiffs.

DONE AND ORDERED at Jacksonville, Florida, this 7th day of January, 1965.

Original signed:

Wm. A. McRAE, JR.

.....

Judge

Copies to all counsel

APPENDIX C

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 22598

WILLIAM H. MANESS and BETTY R. MANESS, his wife,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeals from the United States District Court for the Middle District of Florida.

(October 13, 1966.)

Before BROWN, GEWIN and GOLDBERG, Circuit Judges.

PER CURIAM: This case presents the question whether certain campaign expenses of appellant (taxpayer) are deductible from income on a federal income tax return. The United States District Court for the Middle District of Florida

entered partial summary judgment in favor of the Government holding that such campaign expenditures were not deductible. The facts are undisputed.

In November 1957 the taxpayer was appointed a state judge by the Governor of Florida whereupon he discontinued his law practice in accordance with state law and entered upon the discharge of his duties as judge. In order to continue to hold this position as state judge it was necessary for him to qualify as a candidate to succeed himself in the Democratic Primary and in the general election held in 1958. To qualify as a candidate he was required to pay to the Secretary of State of the State of Florida the sum of $810.00 as qualifying fees and committee assessments. In addition to that expense he also spent the sum of $1,590.00 in his campaign for reelection, all of which was paid from his own personal funds. It is unquestioned that all of the expenditures were normal, authorized and reasonable. The taxpayer deducted these expenses on his federal income tax return for 1958, but the Commissioner of Internal Revenue disallowed them. There was an additional assessment of $1,200.00 plus interest[1] which was paid by the taxpayer who then filed a timely claim for refund. The claim was denied and this suit followed.

The taxpayer claims that his campaign expenses in the amount of $1,590.00 (which sum does not include the $810.00 qualifying fee) are properly deductible as ordinary and necessary business expenses under § 162 of the Internal Revenue

---

1 The assessment of tax by the Commissioner disallowed the $810.00 expended by taxpayer as a qualifying fee. The District Court held in favor of the taxpayer and allowed the deduction of $810.00 and the Government has not appealed from that ruling.

Code of 1954, 26 U.S.C. § 162. In the alternative, the taxpayer claims: (a) that such expenditures are deductible as expenses incurred for the production of income under § 212 of the Internal Revenue Code of 1954, 26 U.S.C. § 212; (b) that such expenses were paid for the management, conservation or maintenance of property held for the production of income under the last cited section; or, (c) that in any event such expenditures were capital in nature and were thereby amortizable over the two year term of office to which he was elected.

We reject the contentions of the taxpayer and agree with the District Court that the taxpayer's campaign expenditures are not deductible either under § 162 as ordinary and necessary business expenses, or as expenses incurred for the production of income under § 212.

The Government contends that this Court is without jurisdiction to consider the taxpayer's contention in this Court that his campaign expenditures are amortizable over the two year term of office because § 7422(a) of the Internal Revenue Code of 1954, 26 U.S.C. § 4422 prohibits suit for refund of taxes unless a claim for refund has first been filed, and since each taxable year is the basis for a separate cause of action a claim for refund must be filed for the yeear in suit. It is argued that the year in suit is 1958 and therefore no claim for refund was filed for the years 1959 and 1960, the two years over which the taxpayer asserts these campaign expenses should be amortized. Assuming without deciding that the Court does have jurisdiction to consider the taxpayer's contention as to amortization of these expenditures, we conclude that such

contention is without merit. *McDonald v. Commissioner*, 323 U.S. 57, 65 S.Ct. 96, 89 L.Ed. 68; *Davenport v. Campbell* (D.C. N.D. Tex. 1964) 238 F. Supp. 568, *aff'd. Campbell v. Davenport* (5 Cir. 1966) No. 22470, ... F.2d, ...

The judgment is AFFIRMED.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1966

No. 22598

D. C. Docket No. 64-97-Civ-J

WILLIAM H. MANESS and BETTY R. MANESS, his wife,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before BROWN, GEWIN and GOLDBERG, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

October 13, 1966

Issued as Mandate: Nov. 4, 1966

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 941

WILLIAM H. MANESS AND BETTY R. MANESS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In November, 1957, petitioner [1] was appointed to the office of Circuit Judge by the Governor of Florida and, as required by law, he discontinued his private practice of law. In order to continue in this office, petitioner stood for election in the 1958 Democratic Primary and General Election. Petitioner spent $1,590 in his campaign for re-election, paying the entire amount from his personal funds.[2] Petitioner

[1] Mrs. Maness is a party only because she filed a joint return with her husband for 1958; Mr. Maness will be referred to as petitioner.

[2] Petitioner paid the State an additional $810 as a qualifying fee and committee assessment which the district court held deductible as a tax. The government did not appeal from that holding.

245-512—67

deducted this amount in his 1958 income tax return; the Commissioner disallowed the deduction, and, after paying the resulting deficiency and filing a claim for refund, petitioner brought suit in the district court. (Pet. App. 11.)

Petitioner claims that his campaign expenses are deductible as either (1) expenses incurred in a trade or business under § 162(a) of the Internal Revenue Code of 1954[3] or (2) expenses incurred for the production of income under § 212.[4] Both lower courts rejected these contentions on the authority of *McDonald* v. *Commissioner,* 323 U.S. 57. In the *McDonald* case this Court held that the campaign expenses of seeking re-election were not deductible business expenses under § 162(a) because they were not incurred in the business of being a judge but rather in trying to become a judge. In this respect they were no different than other nondeductible expenses of persons trying to get into a business or find employment.[5] Nor were these expenses deductible under § 212, since that section does not enlarge upon deductible business expenses but refers only to expenses of producing income from sources other than one's regular business.

In essence, petitioner seeks reconsideration of *McDonald.* As Mr. Justice Frankfurter noted in his

[3] Section 162(a) allows a deduction for "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business * * *."

[4] Section 212 allows an individual to deduct "all the ordinary and necessary expenses paid or incurred during the taxable year (1) for the production or collection of income; (2) for the management, conservation, or maintenance of property held for the production of income * * *."

[5] See Treasury Regulations on Iincome Tax, § 1.212-1(f), *infra.*

opinion for four members of the Court in *McDonald* (p. 63), "the relation of campaign expenditures to tax deductions * * * involves issues of far-reaching importance to a democracy," requiring express Congressional treatment and should not be subsumed under the general categories of deductible expenses.[6] However, in the nearly 23 years since *McDonald* Congress has not attempted to overturn either that decision or the Treasury Regulations which, since 1942, have denied a deduction for "campaign expenses of a candidate for public office."[7]

The *McDonald* decision has also been consistently followed by the appellate and lower courts which have considered the question. *Campbell* v. *Davenport,* 362 F. 2d 624 (C.A. 5); *Mays* v. *Bowers,* 201 F. 2d 401

[6] The same considerations preclude the amortization of these expenses as a capital expenditure (Pet. 24).

[7] This regulation first appeared in Treasury Regulations 103 (1939 Code), § 19.23(a)-15, added by T.D. 5196, 1942-2 Cum. Bull. 96. It now appears in Treasury Regulation § 1.212-1 which provides:

> (f) Among expenditures not allowable as deductions under section 212 are the following: Commuter's expenses; expenses of taking special courses or training; expenses for improving personal appearance; the cost of rental of a safe-deposit box for storing jewelry and other personal effects; expenses such as those paid or incurred in seeking employment or in placing oneself in a position to begin rendering personal service for compensation, campaign expenses of a candidate for public office, bar examination fees and other expenses paid or incurred in securing admission to the bar, and corresponding fees and expenses paid or incurred by physicians, dentists, accountants, and other taxpayers for securing the right to practice their respective professions. See, however, section 162 and the regulations thereunder.

(C.A. 4), certiorari denied, 345 U.S. 969; *Shoyer* v. *United States,* 290 F. 2d 817 (C.A. 3), certiorari denied, 368 U.S. 835; *Nichols* v. *United States,* 201 F. Supp. 337 (N.D. Ga.); and *Reed* v. *Commissioner,* 13 B.T.A. 513, reversed on other grounds, 34 F. 2d 263 (C.A. 3) reversed *per curiam,* 281 U.S. 699. Thus in *Mays* v. *Bowers, supra,* the court of appeals stated (p. 403):

> The salary of an office is paid for the performance of the duties of the office. Expenses incurred in such performance are proper deductions from income, but not expenses incurred in campaigning for the office. Expenses of barbecues, party campaign contributions, hiring of automobiles and pay of poll workers are certainly not expenses incurred in earning the salary of the office. If such deductions should be allowed, the government to the extent of the reduction in taxes thereby obtained would be paying the campaign expenses of the taxpayer, and would be paying a larger portion in the case of a wealthy taxpayer in the high income brackets than of a poor taxpayer in the lower brackets. In cases where the expenses of the campaign equalled or exceeded the salary of the office, which has been known to occur, the taxpayer would pay no tax upon his salary at all. Not until Congress unequivocally allows deductions which are fraught with the possibility of such absurd consequences should the courts sanction them.

The *McDonald* case has established a settled rule which ought not to be changed except by Congress. The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
MITCHELL ROGOVIN,
Assistant Attorney General.
JOSEPH KOVNER,
MARCO S. SONNENSCHEIN,
Attorneys.

FEBRUARY 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967